

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

| | | |
|--|---|---------------------------|
| NANCY DOWD LUMAGHI, <i>individually</i> |) | |
| <i>and as Personal Representative of the</i> |) | |
| <i>Estate of Peter Lumaghi,</i> |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | Case No. 4:21-cv-1311-MTS |
| |) | |
| COVIDIEN LP, <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |

MEMORANDUM & ORDER

Before the Court is Defendants’ Motion to Dismiss, Doc. [28], and Plaintiff’s Motion for Leave to File Second Amended Complaint, Doc. [31]. Having considered the parties briefing and arguments on both motions, the Court finds that allowing Plaintiff to amend would not be futile. *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010) (“Denial of a motion for leave to amend on the basis of futility ‘means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.’” (quoting *Cornelia I. Crowell GST Trust v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir. 2008)); *Streambend Properties III, LLC v. Sexton Lofts, LLC*, 297 F.R.D. 349, 357 (D. Minn.), *aff’d*, 587 F. App’x 350 (8th Cir. 2014) (“Futility determinations utilize the *Twombly* ‘plausibility’ standard under Rule 12(b)(6).”).

IT IS HEREBY ORDERED that Plaintiff’s Motion for Leave to File Second Amended Complaint, Doc. [31], is **GRANTED**. The Court requests Plaintiff to file the Second Amended Complaint, and Defendants shall have the usual time to file any required response. *See* Fed. R. Civ. P. 15(a)(3).

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss, Doc. [28], is
DENIED as **MOOT**.

Dated this 14th day of July, 2022.

A handwritten signature in black ink, appearing to read 'Matthew T. Schelp', written over a horizontal line.

MATTHEW T. SCHELP
UNITED STATES DISTRICT JUDGE